



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



PLEASE NOTE: Effective September 1, 2003, the street address is 29 Hazen Drive.

Motiva Enterprises
798 Haddonfield/Berlin Road
Cherry Hill, New Jersey 08034

Re: 349 LaFayette & Winnacunett Rd.
UST #0-111428, Hampton, NH

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
No. AF 03-044**

December 31, 2003

I. INTRODUCTION

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Waste Management Division ("Division") to Motiva Enterprises, pursuant to RSA 146-C and Env-Wm 1401. The Division is proposing that fines totaling \$2,500 be imposed against Motiva Enterprises for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Waste Management Division is an administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, NH.
2. Motiva Enterprises ("Motiva") is a corporation registered to do business in the State of New Hampshire having a mailing address of 798 Haddonfield/Berlin Road, Cherry Hill, NH 08034.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. RSA 146-C authorizes the Department of Environmental Services ("DES") to regulate the installation, maintenance, operation, and closure of underground storage facilities. Pursuant to RSA 146-C:9, the Commissioner of DES has adopted Env-Wm 1401 to set forth the requirements for underground storage facilities by "establishing criteria for registration and permitting, and standards for design, installation, operation, maintenance, and monitoring of such facilities."
2. RSA 146-C:10-a authorizes the Commissioner of DES to impose administrative fines of up to \$2,000 per offense upon any person who violates any provision of RSA 146-C and any rule adopted under the provisions of this chapter. Pursuant to RSA 146-C:10-a, the Commissioner has adopted Env-C 607 to establish the schedule of fines for violations of RSA 146-C including any rule adopted under the provisions of this chapter. Administrative fines imposed under this section shall not preclude imposition of further penalties under this chapter.
3. Motiva Enterprises is the owner of five underground storage tanks ("UST"), further identified as UST #0-111428, ("the Facility"), located on real property at 349 LaFayette & Winnacunett

Road, in Hampton, New Hampshire ("the Property").

4. The UST system is subject to the requirements of RSA 146-C and the rules adopted pursuant to that chapter, New Hampshire Administrative Rules Env-Wm 1401.
5. Env-Wm 1401.20 requires approval of engineering plans by DES prior to commencing construction on a UST system.
6. Env-Wm 1401.28(s) requires inspection of the system by Division personnel before it is backfilled or placed into service.
7. Env-Wm 1401.04(d) requires a new or amended registration form documenting the changes to the system be filed with the Division at the time of final inspection.

IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINES

1. Motiva Enterprises has violated Env-Wm 1401.20 by commencing construction on a UST system on or about February 4, 2003, specifically installing piping, without obtaining an approval of engineering plans for the system from the Division. For this violation, Env-C 607.03(a) specifies a fine of \$1,000 for failing to obtain approval for the construction or installation of a new underground storage system or substantial modification of an existing system.
2. Motiva Enterprises has violated Env-Wm 1401.28(s) by backfilling the newly installed piping and placing the UST system into service on or about February 4, 2003, before an inspection was performed by the Division. For this violation, Enc-C 607.03(d) specifies a fine of \$500 for failing to notify that the installation of a new or substantially modified underground storage system was complete and ready for inspection.
3. Motiva Enterprises has violated Env-Wm 1401.04(d) by failing to file an amended registration for the newly installed piping at the Facility during the time of final inspection. For this violation, Env-C 607.02(a) specifies a fine of \$1000 for failing to comply with every underground storage facility registration requirement.

The total fine being sought is \$2,500.

V. HEARING, REQUIRED RESPONSE

Motiva has the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, March 15, 2004 at 9:00 a.m.** in **Room C-110** of the DES offices at **29 Hazen Drive** in Concord, NH. **Pursuant to Env-C 601.06, Motiva is required to respond to this notice.** Please respond **no later than February 15, 2004**, using the enclosed colored form as follows:

1. If Motiva plans to attend the hearing, please sign the appearance (upper portion) and return it to the DES Legal Unit, as noted on the form.

2. If Motiva chooses to waive the hearing and pay the proposed fine, please sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.
3. If Motiva wishes to discuss the possibility of settling the case, please sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate Motiva's interest in settling.

Motiva Enterprises is not required to be represented by an attorney. If Motiva chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

If Motiva wishes to have a hearing but are unable to attend as scheduled, Motiva must notify the DES Legal Unit at least one week in advance of the hearing and request that the hearing be rescheduled. If Motiva does not notify the DES Legal Unit in advance and do not attend the hearing, the hearing will be conducted in Motiva's absence in accordance with Env C 204.09.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that Motiva committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules.

Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that Motiva committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

- * Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Motiva Enterprises proves, by a preponderance of the evidence**, applies in this case:
 1. The violation was a one-time or non-continuing violation, **and** Motiva did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** Motiva did not benefit financially, whether directly or indirectly, from the violation.
 2. At the time the violation was committed, Motiva was making a good faith effort to comply with the requirement that was violated.
 3. Motiva has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.


4. Other information exists which is favorable to the Motiva's case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

An administrative fine hearing is a formal hearing. Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that Motiva committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is the Motiva's opportunity to present testimony and evidence that Motiva did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Motiva has any evidence, such as photographs, business records or other documents, that believes show that Motiva did not commit the violation(s) or that otherwise support Motiva's position, the Motiva should bring the evidence to the hearing. Motiva may also bring witnesses (other people) to the hearing to testify on Motiva's behalf.

If Motiva wishes to have an informal meeting to discuss the issues, Motiva must contact the DES Legal Unit at (603) 271-6072 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.state.nh.us.des). If Motiva has any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.


Anthony P. Giunta, P.G. Director
Waste Management Division

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Mark Harbaugh, DES Legal Unit
Susan Weiss Alexant, DES Hearings and Rules Attorney
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
Lynn A. Woodard, P.E. Supervisor
Thomas R. Beaulieu, Chief
Public Information Officer, DES PIP Office

***** RETURN THIS PAGE ONLY *****

MOTIVA ENTERPRISES IS REQUIRED BY LAW TO RESPOND TO THIS NOTICE.

PLEASE RESPOND NO LATER THAN FEBRUARY 15, 1, 2004

APPEARANCE On behalf of Motiva Enterprises.

_____ I will attend the hearing scheduled for Monday, March 15, 2004 at 9:00 a.m. in Room C-110 of the DES offices at 29 Hazen Drive in Concord, NH.

Signature

Date

Name (please print or type):

Title:

Phone Number:

WAIVER OF HEARING On behalf of Motiva Enterprises.

_____ I certify that I understand my right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$2,500 paid to "Treasurer, State of New Hampshire" is enclosed.*

** If payment is made by check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

Pursuant to Env-C 203.05 please provide the following information:

Signature

Date

Name (please print or type):

Title:

Phone Number:

RETURN THIS PAGE ONLY TO:

Michael Sclafani, Legal Assistant

Department of Environmental Services ~ Legal Unit

29 Hazen Drive, P.O. Box 95

Concord, NH 03302-0095

ENVIRONMENTAL Fact Sheet



6 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • www.des.state.nh.us

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Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.